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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5520

MARGARET MAE CANTRELL, *et al.*, *Petitioners,*

v.

FOREST CITY PUBLISHING COMPANY, *et al.*, *Respondents.*

On Writ of Certiorari To The United States Court of Appeals to the Sixth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Preliminary Statement

The Opinion Below

The opinion of the Court of Appeals for the Sixth Circuit appears in 484 F. 2d 150.

Jurisdiction

Jurisdiction is as stated in Petitioners' Brief. It is not contested.

Constitutional Provisions Involved

The case involves the First Amendment of the Constitution of the United States which provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Question Presented for Review

Does the First Amendment protect publication of a non-defamatory newsworthy article from a claim for "false light" invasion of privacy absent proof of calculated falsehood?

The Court below answered this question in the affirmative and remanded for entry of judgment in favor of defendants.

Statement of the Case

A. The Facts

On December 14, 1967, the Silver Bridge connecting Ohio with West Virginia collapsed into the Ohio River. This tragedy resulted in the loss of 44 lives and was the subject of widespread public

interest and concern (Pltf. Ex. 1). Among those killed were Mel Cantrell and Cecil Counts, passengers in a car driven by Margaret Cantrell, who miraculously survived (A. 15). The following day, The Plain Dealer sent reporter Eszterhas to cover the story. During the course of this assignment, Eszterhas met Margaret Cantrell—one of the 18 survivors of the tragedy—and attended the funeral of her deceased husband, Mel Cantrell (Deft. Ex. 2). Eszterhas interviewed the survivors of the bridge tragedy and members of the family of those who were killed (Pltf. Ex. 1). As a result of this on-the-scene investigation Eszterhas wrote an article published in The Plain Dealer for which he was awarded an annual prize presented by the Press Club of Cleveland (A. 67-68). He also shared in an award given by the Ohio Associated Press Society of Columbus, Ohio, for the coverage of this story (A. 69).

On a weekend in May, 1968—five months later—Eszterhas returned to the scene of the tragedy at Point Pleasant, West Virginia, accompanied by a photographer, Richard Conway, to ascertain the effects of the Silver Bridge tragedy on those directly involved. They went to the Cantrell family (A. 45, 62, 75). While at the Cantrell home Eszterhas interviewed, and Conway photographed (A. 78), those members of the family who were present. The impressions of this interview and the photographs taken were published in the August 4, 1968 issue of The Plain Dealer (Pltf. Exh. 1).

B. Pleadings and Motions

The complaint alleged that the privacy of the plaintiffs had been violated by the intrusion of the

newsman and photographer, for unreasonable publicity about their private lives and for falsely presenting their condition and making them objects of pity and ridicule. Mrs. Cantrell brought suit for herself and all of her children, but all plaintiffs except Mrs. Cantrell and one son, William David Cantrell, were dismissed by the Court. The complaint also charged the defendants with "malicious and defamatory libel". As developed by the evidence the intrusion complained of consisted of publication of an article which placed the Cantrell family in a bad light because of its inaccuracies and untruths. This is the way the matter was presented to the jury and there was no complaint on appeal concerning the jury charge (A121-2).

At the conclusion of the plaintiffs' case, in response to a motion for a directed verdict on behalf of all the defendants, the District Court found "that there has been no evidence to support the charges that the invasion of privacy, if in fact an invasion of privacy occurred was done maliciously within the legal definition of that term". The District Court then ordered stricken all allegations relating to punitive damages, and dismissed as to several infant plaintiffs, but denied the motion for a directed verdict as to Petitioners (A. 119).

C. Holding Below

Although Mrs. Cantrell and her son were displeased with the article published by the Plain Dealer and the article was not as carefully written as it should have been, nevertheless there was no proof that the Forest City Publishing Company printed and distributed the article with any knowledge of the falsities contained in it or in reckless

disregard of whether or not it was true. Absent a calculated falsehood, the publication or broadcast of material concerning an event of public interest may not result in the imposition of a judgment for damages because of falsehoods or distortions arising from negligence or poor reporting. The failure of the defendant Forest City Publishing Company to verify the factual assertions in the story is not condoned, but there was no evidence of calculated falsehood (A. 130).

Summary of The Argument

A. Of the four complex torts involved in an invasion of the right of privacy, we are concerned only with the "false light" theory. This Court, and the lower courts, have consistently accommodated the individual's right of privacy to the First Amendment guaranty of the freedom of the press concerning newsworthy events.

B. This case was tried on the "false light" theory under the principles of *Time* v. *Hill*. The lower courts found no evidence of a calculated falsehood. Therefore petitioners have no cause of action.

C. The newspaper has a duty to publish and the public is entitled to know about newsworthy people and events taking place in the nation and in the community. The article is not offensive. Nothing stated in the article would alert a reasonably prudent editor of prospective liability. Applying the principles of *Time* v. *Hill*, the Court of Appeals properly held that petitioners have no basis for a "false light" invasion of privacy action. Standards less stringent than established in *Time* v. *Hill* would chill an editor's desire to publish newsworthy articles of community and public concern. A newspaper is more than a

passive receptacle or conduit for news and comments. The choice of material to go into a newspaper, and the decision making process concerning the content of the article and other problems constitutes the exercise of editorial control and judgment which should not be burdened with the impossible task of verifying to a certainty, the facts asserted in news articles, particularly as related to non-defamatory matter.

ARGUMENT

A NON-DEFAMATORY NEWSPAPER ARTICLE CONCERNING NEWSWORTHY PERSONS, EVENTS AND ISSUES IS NOT ACTIONABLE ABSENT PROOF OF CALCULATED FALSEHOOD.

A. The Nature of the Tort

This is an action for invasion of privacy. From 1890,[1] to this Court's decision in 1967 on the opening of a New York City play,[2] to the aftermath of the Silver Bridge tragedy and the report of the family of one of the victims,[3] we witnessed the gradual accommodation of one's right of privacy to the report of newsworthy events and persons claimed to be depicted in a false light to the public.

In the leading modern treatise on the subject,[4] Dean Prosser traced the history of this right of privacy and observed:

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[1] Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193

[2] *Time, Inc.* v. *Hill*, 385 U.S. 374 [1967]

[3] 484 F. 2d 150; see Petitioner's Exh. 1

[4] William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 [1960]

"It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley 'to be let alone'. Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation for the defendant's advantage, of the plaintiff's name or likeness." (48 Cal. L. Rev. 389.)

As noted by the Courts below, this case was tried as a "false light" case—as was the "fictionalization" in *Time, Inc.* v. *Hill*—subject to this Court's falsity standard enunciated in *Time, Inc.* v. *Hill*, (385 U.S. 374). The case does not involve: (a) "intrusion" and claimant's rights deriving from the Fourth Amendment; (b) sensational disclosure of private facts offensive to public mores; or (c) "commercialization" of a person's identity. It does involve the tension between personal privacy and the First Amendment. Resolution of this issue will determine the future of newspaper articles regarding the myriad of problems which make the reader aware of the concerns of society and his community.

In *Afro-American Publishing Co.* v. *Jaffe*, 366 F. 2d 649 (1966), the District of Columbia Circuit Court of Appeals sitting en banc discussed the elements of the tort and the respective rights of the parties in a case of unwanted false light publicity:

> "[A cause of action for invasion of privacy] represents a vindication of the right of private personality and emotional security, the essence of the interest protected being aptly summarized in Judge Cooley's perceptive phrase, 'the right to be let alone'. The historic 1890 article of Louis D. Brandeis and Samuel Warren stressed the need for solitude and privacy as a counterpoise to the intensity and complexity of contemporary civilization. That was written at a time when privacy was imperiled by the rise and conspicuous success of the yellow journalism of the 19th century. The action is no less imperative under the conditions of today, when privacy is imperiled by the communications explosion, and by a deplorable eruption of all manner of mechanical and electronic devices for snooping.
>
> "However, the right of privacy is not an absolute. The Restatement of Torts states that liability attaches to a person 'who unreasonably and seriously interferes with another's interest in not having his affairs known to others'.
>
> "An action is maintable even when all statements made are completely true and accurate. Different patterns of interference are reflected in the cases, and a variety of sub-doctrines have evolved. The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees. But this must be accommodated to the need for reasonable latitude for

> the selection of topics for discussion in newspapers. That right of the press, likewise supported by constitutional guarantees, is crucial to the vitality of democracy. The courts are called upon here, as elsewhere in the law, to harmonize individual rights and community interests. In appraising challenged violations of privacy a 'distinction can be made in favor of news items and against advertising use'.
>
> "We think the trial court erred in finding that the case at bar involved an actionable invasion of privacy. When a proprietor of a news vending outlet in a predominently Negro neighborhood discontinues the handling of a newspaper oriented to Negro readers, the matter is appropriate for newspaper discussion, with pictorial accompaniment, without fear of an overhanging action for invasion of privacy." (Footnotes omitted)

The following year this Court, cognizant of the thinking of hundreds of Courts—both State and Federal—and the divergent views of legal writers since 1890, handed down its decision in *Time, Inc.* v. *Hill* as an accommodation between the right of privacy and the First Amendment's right of the people to know in a situation of a non-defamatory, albeit false, publication concerning newsworthy events. Absent the New York statute, factual and legal issues brought to this Court in this case are identical to those presented in *Time, Inc.* v. *Hill*.

B. Petitioners Did Not Establish A "False Light" Invasion of Privacy by Publication

This action was tried on the sole theory that an individual's right of privacy was invaded where there is pub-

licity which unreasonably places him in a false light in the public eye (484 F. 2d 150, 153). The Courts below proceeded on, and were guided by this Court's holding in *Time, Inc.* v. *Hill*, 385 U.S. 374, that:

> "the constitutional protections for speech and press preclude the application of the New York [right of privacy] statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (385 U.S. at 387-388)

The Appellate Court below found that the article was newsworthy and that there was no evidence of publication "with knowledge of the falsities contained in [the article] or in reckless disregard of whether or not [the article] was true". It held:

> "Absent calculated falsehood the publication or broadcast of material concerning an event of public interest may not result in the imposition of a judgment for damages because of falsehoods or distortions arising from negligence or poor reporting. The failure of the defendant, Forest City Publishing Co., to verify the factual assertions in the story is not condoned but there was no evidence of calculated falsehoods." (A 130)

In such cases, as here, a newspaper should not be held liable for invasion of privacy arising from publication of a non-defamatory article placing a person in a false light without proof that the article was published with knowledge of its falsity or in reckless disregard of the truth.

C. The Standard Set by This Court in *Time, Inc.* v. *Hill* Is Reasonable And Constitutionally Operable. A Lesser Standard Would Impose a Chilling Restraint on the Publication of Newsworthy Events

This Court recognized the nature of the burden imposed on the press and the resulting Constitutional impairment which would result from a test of liability less than the standard of *Time, Inc.* v. *Hill*, 385 U.S. 389:

> ". . . We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, *particularly as related to nondefamatory matter.* Even negligence would be a most elusive standard, *especially when the content of the speech itself affords no warning of prospective harm to another through falsity.* A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portait." (Emphasis added)

The reasoning of the Court below accommodates the competing rights of persons to their privacy with the right of the public to know and the right of the press to publish non-defamatory newsworthy items.

This accommodation is not based upon negligence but rather upon whether the events or the persons involved are "newsworthy."

> ". . . [D]espite vigorous efforts to avoid publicity, some people remain newsworthy because of

circumstances which arouse a legitimate interest in their lives . . . The judgment of what is newsworthy must remain primarily a function of the publisher. However, in cases where essentially private persons are the subject of publicity because of the involuntary connection with events of widespread interest, this discretion or judgment of the publisher cannot be absolute. The curiosity and voracious appetite of the public for scandal would be too easily exploited by unscrupulous publishers. The right of the public to know is clearly one of the primary values protected by the First Amendment and Its '. . . guarantees are not for the benefit of the press so much as for the benefit of all of us'. *Time, Inc.* v. *Hill, supra* at 389 . . . Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher." (484 F. 2d 156-7).

From the beginning, newsworthiness has been recognized as a legitimate limitation on the right of privacy:

> "The right of privacy does not prohibit any publication of matter which is of public or general interest." (Warren and Brandeis, *The Right of Privacy,* 4 Harv. L. Rev. 193, 214 [1890])

This was recognized by Dean Prosser as follows:

> "Caught up and entangled in this web of news and public interest are a great many people who have not sought publicity, but indeed, as in the case of the accused criminal, have tried assiduously to avoid it. They have nevertheless lost some part of their right of privacy. The misfortunes

> of the frantic woman whose husband is murdered before her eyes, or the innocent bystander who is caught in a raid on a cigar store and mistaken by the police for the proprietor, can be broadcast to the world, and they have no remedy. Such individuals become public figures for a season; and until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims. The privilege extends even to identification and some reasonable depiction of the individual's family, although there must certainly be limits as to their own private lives into which the publisher cannot go." William L. Prosser, *Privacy,* 48 Cal. L. Rev. 413-414 [1960] (footnotes omitted).

This limitation was noted by this Court in *Garrison* v. *Louisiana,* 379 U.S. 64:

> "Even the law of privacy . . . recognizes severe limitations where public figures or newsworthy facts are concerned." (379 U.S. 73, fn. 9)

Certainly the right of the people to know and the rights of the press to publish require that, where a newspaper comments on persons involved in a newsworthy event and such comments are, as here, within the range of the facts or issues arising out of or resulting from such event, priority be given these First Amendment rights rather than "the less explicit and less well defined right of privacy". (A 127)

The *Gertz* standard of liability for libel *per se* should not be adapted to causes of action for false light invasion of privacy since the content of the article does not warn

an ordinarily prudent editor of its actionable potential (*Gertz* v. *Welch*, —— U.S. —— 42 LW 5131). If the States may establish standards of liability which could be something less than the *Time, Inc.* v. *Hill* standard, the freedom of the press to publish newsworthy articles of social concern will be destroyed. And this is so because the most knowledgeable editor may not be able to detect error in a non-defamatory article, whereas his journalistic antennae alert him to key defamatory words or concepts.

This Court, and the lower Courts which will be required to distinguish the "public" status of the claimants and to hone the concept of "actual injury" (*Gertz* v. *Welch*, U.S. 42 LW 5131) will have struggled mightily, but in vain, if the carefully structured Constitutional balance made operative in libel actions may be sidestepped by pleading the same facts in the guise of a claim for "false light" invasion of privacy. The right of the people to know is not served, and freedom of the press is not guaranteed, if, as in this case, Courts determine that a newspaper article is not defamatory, and the defendants had no knowledge of inaccuracies allegedly contained in the article, and, nevertheless, a jury is permitted to award chilling damages for "false light" invasion of privacy.

Where a person becomes newsworthy by being connected with a newsworthy event, this person has no "right of privacy" with regard to, or in connection with, the facts, circumsances and issues concerning or flowing from such event. What might otherwise be construed as an *unwarranted* intrusion into one's private affairs becomes *warranted* by the connection of the person with the event, giving rise to the newspaper's Constitutional right to publish articles concerning newsworthy events. The broadest protection afforded by the First Amendment

should be applied "to assure the freedom of speech and press that 'breathing space' essential to their fruitful exercise". (*Gertz* v. *Welch*, ——US——, 42 LW 5129; *NAACP* v. *Button*, 371 U.S. 415 (1963). As the Court below appropriately stated:

> "If there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy." (A 127)

In this invasion of privacy action, there is no defamatory publication, no calculated falsehood, no commercialization or (contrary to Appellants' contentions throughout their Brief) trespass (484 F. 2d 150, 153, 154-5). It is submitted that in the absence of one of these elements, the First Amendment precludes recovery.

CONCLUSION

The determination below should be affirmed.

Whether this Court (a) adopts the standard that newspapers may publish articles free from defamatory or calculated falsehood without fear of civil litigation; or (b) reannunicates the *Time, Inc.* v. *Hill* standard as applied by the Court below, there is no evidence in this case—and there is nothing in the article complained of to alert a knowledgeable editor—that the article was published with the knowledge of its falsity or with reckless disregard of the truth. The judgment of the Court below should be affirmed.

Respectfully submitted,

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